

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 25, 2006

STATE OF TENNESSEE v. WALLACE WAYNE WILLINGHAM

**Direct Appeal from the Circuit Court for Giles County
No. 10334 Jim T. Hamilton, Judge**

No. M2005-00717-CCA-R3-CD - Filed November 1, 2006

The defendant, Wallace Wayne Willingham, was convicted by a Giles County jury of possession of more than .5 grams of cocaine with the intent to sell, a Class B felony. He was sentenced to thirty years in the Department of Correction as a career offender. On appeal, he challenges the sufficiency of the convicting evidence. Upon our review of the record and the parties' briefs, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ. joined.

Stanley K. Pierchoski (on appeal), Lawrenceburg, Tennessee, and Keith R. Peterson (at trial), Pulaski, Tennessee, for the appellant, Wallace Wayne Willingham.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Mike Bottoms, District Attorney General; and Patrick Butler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The following evidence was presented at trial. On May 10, 2001, Pulaski Police Department and Giles County Sheriff's Department officers executed a search warrant at the defendant's residence. The defendant and his girlfriend were present at the time. Once the law enforcement officers were inside, the defendant asked Investigator L.C. Gill to accompany him to the kitchen where the defendant pulled a bag of what appeared to be crack cocaine out from his sock and another bag out from his pocket. In searching a bedroom closet, Investigator Gill found another bag of what appeared to be cocaine hidden in a man's shoe. Among other things, the officers also uncovered \$940.00 in cash, digital scales with cocaine residue, marijuana, a crack pipe and cleaners, and an

address book. Two forensic scientists with the Tennessee Bureau of Investigation (TBI) subsequently tested the substance that appeared to be cocaine and confirmed that it was cocaine, weighing a combined total of more than 17 grams.

At trial, Investigator Gill admitted that the affidavit of complaint he took out against the defendant said that the defendant possessed approximately 23 grams of cocaine, which was based on Investigator Joel Robison's field test. Investigator Gill explained that in the field the officers "weigh bag and all." Investigator Gill also explained that people involved in the resale of drugs often use scales to weigh out portions of the controlled substance. When questioned about the discrepancy between the field weight and the TBI weight, Investigator Gill pointed out that the TBI weighs the drugs without the bag or packaging. Investigator Gill was also questioned about how his incident report listed three bags of cocaine or crack cocaine, but the evidence control record showed four bags. Investigator Gill suggested that the incident report might have listed only the drugs recovered from the defendant; whereas, the evidence control record might have included drugs recovered from the defendant's girlfriend.

Officer Joey Turner testified that he found digital scales while searching the defendant's house. Officer Turner noted that the scales were too small to be used for weighing a person. Instead, based on his experience and training, he explained that digital scales were often used to weigh precise amounts of controlled substances for resale. Officer Turner also recovered a memo pad with addresses and phone numbers, including several of out-of-state telephone numbers.

Agent Diane Smith with the TBI Crime Laboratory testified that she analyzed four bags of drugs brought to her by Investigator Robison.¹ Agent Smith determined that item 1 was cocaine weighing 13.8 grams; item 2 was cocaine weighing 1.3 grams; and item 3 was cocaine weighing 2.4 grams. Agent Smith noted that item 2 was packaged in eight small self-tied plastic triangles and item 3 was packaged in five self-tied plastic bags. Agent Smith said that she also tested item four, which was recovered from the defendant's girlfriend's purse. Item 4 was cocaine weighing .2 grams. Agent Smith stated that it was not uncommon for a police departments' field weight to be heavier than the TBI's based on the fact the TBI weighs the drugs out of the packaging, the local police departments' scales are normally not as accurate as the TBI scales, and because the drugs can naturally dry out over time.

Investigator Robison testified that he served as the evidence custodian during the search of the defendant's house. He was in charge of receiving, listing, and transporting all the evidence. Investigator Robison stated that he weighed the larger of the two bags of drugs Investigator Gill recovered from the defendant and it weighed approximately one-half ounce or 14.1 grams. Investigator Robison also field-tested residue found on the digital scales and it tested positive for cocaine. Investigator Robison stated that he does not un-package the drugs prior to weighing them; therefore, it is not uncommon for the TBI weights to be less than the weight noted in the field.

¹ A second TBI agent, Donna Flowers, also analyzed the substances because Agent Smith was going to be out of the country and thus unable to testify at an earlier hearing. Agent Flowers' results were the same as Agent Smith's.

Investigator Robison stated that based on his experience and training, finding cocaine packaged in individual bags indicated that the person had packaged the cocaine for resale. Likewise, finding a set of digital scales indicated that the person was buying larger amounts of a controlled substance and weighing it out for individual sale. When asked whether it was possible to send a bag of drugs to the TBI mistakenly labeled for another case, Investigator Robison stated that it was possible but he could not remember it ever happening. When questioned about why only four bags of drugs were sent to the TBI for analysis when crack and cocaine were listed five times on the evidence inventory sheet, Agent Robison recalled that the fifth item was a slight amount of crack cocaine residue wrapped in a paper towel. He acknowledged that he did not write “residue” on the form to indicate the distinction.

Following the conclusion of the proof, the jury found the defendant guilty of possession of more than .5 grams of cocaine with intent to sell. A sentencing hearing was conducted, after which, the trial court sentenced the defendant to thirty years in the Department of Correction as a career offender.

ANALYSIS

On appeal, the defendant argues that the trial court erred in denying his motion for new trial because the evidence was insufficient to convict him. Specifically, the defendant asserts that the evidence was insufficient because there were variations in the number and weight of the drugs seized from his home and the drugs analyzed by the TBI.

We begin our review by reiterating the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury’s verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no “rational trier of fact” could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury’s verdict approved by the trial judge accredits the state’s witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury’s inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

The defendant was convicted of violating Tennessee Code Annotated section 39-17-417 which at the time of the offense provided:

(a) It is an offense for a defendant to knowingly:

....

(4) Possess a controlled substance with intent to manufacture, deliver or sell such controlled substance.

....

(c) A violation of subsection (a) with respect to:

(1) Cocaine is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine and, in addition thereto, may be fined not more than one hundred thousand dollars (\$100,000). . . .

A person “acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.” Tenn. Code Ann. § 39-11-302(b). “It may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing.” *Id.* § 39-17-419.

In the light most favorable to the state, the evidence shows that the defendant possessed more than .5 grams of cocaine with the intent to sell. The search of the defendant’s home led to the recovery of over .5 grams of cocaine, as both the TBI weight and field weight were well over the .5 gram threshold. In fact, one of the bags voluntarily turned over by the defendant was alone 13.3 grams more than the .5 gram threshold. The evidence also shows that the defendant “knowingly” possessed the cocaine in that two of the bags, weighing a combined total of approximately 15 grams, he voluntarily turned over to Investigator Gill off his person. Another bag was found in a male shoe in the bedroom closet, thus in the defendant’s constructive possession.

The evidence further shows that the defendant possessed the cocaine with intent to sell. When conducting her analysis, Agent Smith discovered that two of the bags of cocaine actually contained several small self-tied plastic bags: the bag of cocaine found in the shoe was packaged into five small baggies and the smaller bag turned over by the defendant was packaged into eight small baggies. Investigator Robison testified that based on his experience and training, finding controlled substances packaged in smaller bags indicated that the substance was packaged for resale. Additionally, the search of the defendant’s home uncovered a set of digital scales with cocaine residue, \$940.00 in cash, and an address book. Investigator Gill and Officer Turner testified that based on their experience and training, digital scales were often used to weigh controlled substances for resale.

The defendant's entire argument is in essence an attack on the police officers' credibility regarding their gathering, recording, and processing of evidence. Investigator Gill provided an explanation regarding why the number of bags of drugs listed on various documents were different, and the jury obviously accredited his testimony. Also, Investigator Robison and TBI Agent Smith noted that it was not uncommon for field weights to differ from TBI weights due to different methods of weighing, accuracy of the equipment, and the natural drying out of the drugs. Once again, the jury accredited this testimony. We reiterate, questions concerning the credibility of the witnesses are resolved by the jury as the trier of fact. *Bland*, 958 S.W.2d at 659. Based on the evidence presented at trial, we conclude that any rational trier of fact could have found the defendant guilty of possession of more than .5 grams of cocaine with intent to sell beyond a reasonable doubt.

CONCLUSION

For the aforementioned reasons, we affirm the judgment of the Giles County Circuit Court.

J.C. McLIN, JUDGE